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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANTONIO DEINDE FERNANDEZ,

Petitioner,

—v.—

BARBARA J. FERNANDEZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTIONS PRESENTED

I. Whether Article 31 1(a) of the Vienna Convention on Diplomatic Relations, which provides a narrow exception to the broad rule of diplomatic immunity for "real actions relating to private immovable property . . . ," gives a state court jurisdiction over an ambassador's real property in a divorce action—an action in which (a) the real property will be awarded based not on any claimed title rights *per se*, but rather on *in personam*, equitable distribution criteria that have no relevance to legal title, and (b) the inquiry required to make such a distribution will deeply intrude into the ambassador's personal affairs?

II. Whether a state court, having assumed jurisdiction over a divorce action involving an ambassador only by way of a Limited Waiver of Diplomatic Immunity extended pursuant to Article 32 of the Vienna Convention to permit "a dissolution of the marital status only," can disregard that express limitation and make an equitable distribution award of the ambassador's real property to his spouse as part of a divorce judgment?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Antonio Deinde Fernandez, Ambassador and Deputy Permanent Representative to the United Nations for the People's Republic of Mozambique, and the respondent, Barbara J. Fernandez.

The United States Department of Justice, as *amicus curiae*, filed a brief with the Connecticut Supreme Court.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
List of Parties	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provisions, Treaties and Statutes Involved	2
Statement of the Case	4
Statement as to Finality	11
Reasons for Granting the Writ	12
I. This Case Is One Of Only Two Types Of Controversies Deemed Sufficiently Significant By The Framers Of The United States Constitution To Merit This Court's Original Jurisdiction	12
II. The Decision Below Presents An Important Case Of First Impression With Respect To The Scope Of Diplomatic Immunity Under Article 31 Of The Vienna Convention	13
III. The Decision Below Presents An Important Question With Respect To The Effect Of A Waiver Of Immunity Under Article 32 Of The Vienna Convention	19
Conclusion	22
Appendix	1a

TABLE OF AUTHORITIES

Cases: PAGE

Anonymous v. Anonymous, 44 Misc.2d 14, 252 N.Y.S.2d 913 (N.Y. Fam. Ct. 1964)..... 15

Board of Commissioners v. Hunter, 354 So.2d 156 (La. 1977)..... 16

Boddie v. Connecticut, 401 U.S. 371 (1971)..... 10

Carrera v. Carrera, 84 App. D.C. 333, 174 F.2d 496 (D.C. Cir. 1949)..... 15

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) . 12

Farrands v. Melanson, 438 A.2d 910 (Me. 1981)..... 16

Lewien v. Cohen, 432 A.2d 816 (Me. 1981)..... 16

Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963)..... 12

Mitchell v. Forsyth, 472 U.S. 511 (1985).....11, 12

Segni v. Commercial Office of Spain, 816 F.2d 344 (7th Cir. 1987)..... 11

Shaffer v. Heitner, 433 U.S. 186 (1977) 12

Shaw v. Shaw, 3 W.L.R. 24, 3 All E.R. 1 (Fam. Div. 1979)..... 14

Tsiang v. Tsiang, 194 Misc. 259, 86 N.Y.S.2d 556 (N.Y. Spec. Term 1949)..... 15

Constitutional Provisions:

United States Constitution, Article III..... 2

United States Constitution, Article VI..... 2

PAGE

Statutes and Treaties:

Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, June 26, 1957, 61 Stat. 3416, T.I.A.S. No. 1676, 11 U.N.T.S. 11 .....2, 3, 4

22 U.S.C. § 254d.....4, 5, 19

28 U.S.C. § 1251(b)(1) 12

28 U.S.C. § 1257(a)..... 2, 11

General Statutes of Connecticut § 46b-81 ..... 4, 17

General Statutes of Connecticut § 52-265a 6, 14

Vienna Convention on Diplomatic Relations, *opened for signature* April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. (Entered into force with respect to the United States of America December 13, 1972) .....*passim*

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E. Denza, *Diplomatic Law—Commentary on the Vienna Convention on Diplomatic Relations*, 155 (1976)..... 14

Pomeroy, *Remedies and Remedial Rights by the Civil Action*, 14 (1876) 15, 16

Report of the International Law Commission to the General Assembly, [1956] II Y.B. Int'l L. Comm'n 139, U.N. Doc. A/CN.4/SER.A/1956/Add.1 14

Summary Records of the 402nd Meeting, [1957] 1 Y.B. Int'l L. Comm'n 97, U.N. Doc. A/CN.4/SER.A/1957 14

PAGE

3 Street, *Foundations of Legal Liability*, 37-38 (1906) .. 15

7 M. Whiteman, *Digest of International Law*, 407 (1970) 16, 17

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OCTOBER TERM, 1988

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—v.—

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioner, Antonio Deinde Fernandez, Ambassador, Deputy Permanent Representative at the Permanent Mission of the Peoples' Republic of Mozambique to the United Nations, respectfully prays that a writ of certiorari issue to review the decision of the Connecticut Supreme Court entered in the above-captioned proceeding on July 19, 1988.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court is reported at 208 Conn. 329, 545 A.2d 1036, and is reprinted in the Appendix hereto, p. 2a, *infra.*

The memorandum decision of the Superior Court for the Judicial District of Stamford/Norwalk at Stamford, Connecticut (Novack, J.), which was the trial court in this matter, has

not been reported. It is reprinted in the Appendix hereto, p. 22a, *infra*.

JURISDICTION

The decision and judgment of the Supreme Court of Connecticut were entered on July 19, 1988. (p. 2a, *infra*). In that decision, a majority of the Court found no error in the October 13, 1987 decision of the Superior Court for the Judicial District of Stamford/Norwalk at Stamford, Connecticut. On September 20, 1988, the Connecticut Supreme Court denied a timely Motion for Reargument and Clarification of its decision. (p. 1a, *infra*).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

1. United States Constitution, Article III:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . . .

2. United States Constitution, Article VI:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .

3. Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 3416, T.I.A.S. No. 1676, 11 U.N.T.S. 11, section 15:

(1) Every person designated by a Member as the principal resident representative to the United Nations of such Member or as a resident representative with the rank of ambassador or minister plenipotentiary,

. . .

. . . shall . . . be entitled in the territory of the United States to the same privileges and immunities . . . as it accords to diplomatic envoys accredited to it.

4. Vienna Convention on Diplomatic Relations, opened for signature April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. (Entered into force with respect to the United States of America December 13, 1972).

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission.

Article 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.

2. Waiver must always be express.

. . . .

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

5. The Diplomatic Relations Act, § 5, 22 U.S.C. § 254d (1982):

> Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations . . . shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the individual . . . .

6. General Statutes of Connecticut § 46b-81 (1987):

> (a) At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the superior court may assign to either the husband or the wife all or part of the estate of the other.
>
> . . .
>
> (c) In fixing the nature and value of the property, if any, to be assigned, the court . . . shall consider the length of the marriage, the causes of the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.

STATEMENT OF THE CASE

The petitioner, Antonio Deinde Fernandez, is the Ambassador and Deputy Permanent Representative to the United Nations for the People's Republic of Mozambique, and has been accredited as such by the Department of State of the United States of America. By virtue of his position, and pursuant to applicable provisions of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat.

3416, T.I.A.S. No. 1676, 11 U.N.T.S. 11 (the "Headquarters Agreement") and the Vienna Convention on Diplomatic Relations, *opened for signature* April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (the "Vienna Convention"), Ambassador Fernandez is immune from all criminal, civil and administrative jurisdiction in the United States with the exception of three very specific types of claims.[1]

Despite the Ambassador's diplomatic immunity, Mrs. Fernandez, in January, 1987, commenced a divorce action against him in the Connecticut Superior Court. Prior to serving papers on the Ambassador, Mrs. Fernandez obtained several *ex parte* prejudgment remedies, including an $8,000,000 attachment of the Ambassador's real and personal property. (p. 4a, *infra*). The attachment was executed against the Ambassador's residence in Connecticut.

Upon learning of the lawsuit and the *ex parte* orders, Ambassador Fernandez, in March, 1987, filed a motion to dismiss the entire action for lack of personal jurisdiction and to vacate all the prejudgment remedy orders. That motion was based on the Ambassador's status as an accredited diplomatic agent and the resultant privileges and immunities accorded him thereby under the Vienna Convention. (p. 2a, *infra*). Additionally, the motion was based on the mandate of section 5 of the Diplomatic Relations Act, 22 U.S.C. § 254d, which provides that: "Any action or proceeding brought against an individual who is entitled to

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1 In this regard, Article 31 of the Vienna Convention provides in part:

> 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
>
> (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
>
> (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
>
> (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations . . . shall be dismissed." Motion to Dismiss and memorandum in support thereof and October 6, 1987 Transcript at 51 through 56.

Hearings on the motion were held on September 14, 1987 and October 6, 1987. At the latter hearing, the Associate Chief of Protocol of the United States Department of State testified to the Ambassador's status as Ambassador, Deputy Permanent Representative at the Permanent Mission of the People's Republic of Mozambique to the United Nations. The Associate Chief of Protocol testified further that the Ambassador had been accepted as such by the United States Government on February 1, 1985 and that he continued to enjoy that status. October 6, 1987 Transcript at 22-25.

The Connecticut Superior Court, in a Memorandum of Decision entered on October 13, 1987, found that Ambassador Fernandez was a diplomatic agent and "entitled to diplomatic immunity from all civil and administrative proceedings." (p. 25a, *infra*). However, the Superior Court then held that, under Connecticut's local law, divorce actions were not civil actions but rather "family relations matters" for which the Vienna Convention provided no immunity. Accordingly, the Superior Court concluded that the Ambassador's "diplomatic immunity does not extend to this dissolution action," and that he was personally amenable to jurisdiction in this matter. (p. 26a, *infra*). As a postscript and in the alternative, the Superior Court ruled that, even if it lacked personal jurisdiction over the Ambassador because of his diplomatic immunity under the Vienna Convention, it still had jurisdiction over the marital *res* under Connecticut's local law and could, therefore, grant a divorce in this action. (p. 26a-27a, *infra*). Based on this reasoning the Superior Court denied the Ambassador's motion to dismiss. (*Id.*).

On October 27, 1987, Ambassador Fernandez filed a petition pursuant to section 52-265a of the Connecticut General Statutes, which provides for direct and expedited appeals to the

Connecticut Supreme Court of actions involving substantial public interest, seeking permission to appeal directly to the Connecticut Supreme Court from the denial of his motion to dismiss. On October 28, 1987, that petition was granted and the Connecticut Supreme Court certified the appeal.

During the pendency of the appeal before the Connecticut Supreme Court, the Government of the People's Republic of Mozambique delivered a Limited Waiver of Immunity ("Limited Waiver") to the United States Department of State. A copy of the Limited Waiver was annexed to the Ambassador's brief to the Connecticut Supreme Court. (p. 6a, n.7, *infra*). In pertinent part, the Limited Waiver provided:

> Pursuant to Article 32 of the Vienna Convention on Diplomatic Relations, the People's Republic of Mozambique hereby waives the immunity extended by the United States of America to Ambassador Antonio Deinde Fernandez under the provisions of the Vienna Convention on Diplomatic Relations to the following limited and restricted extent only, viz: to permit the Superior Court for the Judicial District of Stamford/Norwalk at Stamford, Connecticut, U.S.A. to enter an order dissolving the marital status only between Ambassador Antonio Deinde Fernandez and his wife, Barbara J. Fernandez, in a civil action presently pending in said Court, encaptioned *Fernandez v. Fernandez*, docket number FA-87-0085485-S. This limited and restricted waiver of diplomatic immunity does not encompass, and shall not be construed as encompassing, any waiver whatsoever of Ambassador Antonio Deinde Fernandez' diplomatic immunity under said Vienna Convention on Diplomatic Relations from *in personam*, *in rem* or any other type of jurisdiction whatsoever with respect to his person or property or any property in which he may have or claim to have an ownership interest including, without limiting the generality of the foregoing, his immunity from any awards of property and/or alimony that might otherwise be appropriate in any such matrimonial proceeding.

(*Id.*).

While on appeal, the United States Department of Justice was granted permission to, and filed, an *amicus curiae* brief. In that brief, they argued that the trial court had erred in asserting jurisdiction over the Ambassador. First, the Department of Justice pointed out that divorce actions were clearly intended to be within the scope of immunity afforded ambassadors under the Vienna Convention's immunity from civil jurisdiction. Secondly, it noted that "the mere fact that real property might be involved in the ultimate resolution of this suit does not bring it within the real property exception of Article 31." Brief for United States as *Amicus Curiae* at 6 n.3.

In a decision entered on July 19, 1988, after an *en banc* hearing, the Connecticut Supreme Court acknowledged the Ambassador's diplomatic status and held that the trial court erred in asserting jurisdiction over all facets of the case on the notion that a divorce action is a "family relations" action rather than a "civil" action. In reaching this result, the Court stated:

> Article 31 of the Vienna Convention provides that a "diplomatic agent shall enjoy immunity from the . . . civil and administrative jurisdiction" of the receiving state. The negotiating history of the Convention supports a broad reading of this language. . . . Further, *the record reveals an explicit awareness by the drafters that marital dissolution proceedings were prohibited by the Convention.*

(p. 8a, *infra*, emphasis added).

As set forth above, the People's Republic of Mozambique filed a Limited Waiver of Immunity while the matter was on appeal to the Connecticut Supreme Court. That Limited Waiver permitted the Connecticut superior court "to enter an order dissolving the marital status only" between the Ambassador and Mrs. Fernandez but clearly and specifically prohibited its use for any further orders. Referring to that waiver, a majority of the five Justices of the Connecticut Supreme Court stated that the matter would have to be remanded in any case for an adjudication of the marital status question. Then, despite the clearly restricted language of the Limited Waiver and its own recognition that marital dissolution proceedings were prohib-

ited by the Convention, the Connecticut Supreme Court reviewed Mrs. Fernandez' complaint to determine whether any of the other substantive or remedial relief requested therein could be granted.

In so reviewing Mrs. Fernandez' complaint, the Court described part of the remedy sought therein as follows: "[i]ncident to the dissolution, the plaintiff requests an assignment 'of all of *defendant's* right, title and interest in certain real property located at 27 Oaley [sic] Lane, Greenwich, Connecticut.' " (p. 3a, *infra*, emphasis added). On appeal, Mrs. Fernandez argued that this claim should be permitted to proceed against the Ambassador under one of the exceptions to immunity set forth in Article 31, *i.e.*, the so-called "real action" exception. In this regard, paragraph 1(a) of Article 31 provides the immunity afforded diplomatic agents does not apply with respect to "a real action relating to private immovable property . . . ." With respect to this assertion and "the intended scope of the language of the exception," the Court quickly recognized, "*we face a question of first impression.*" (p. 11a, *infra*, emphasis added). In resolution of this question, the Court held that Mrs. Fernandez' claim to the Ambassador's real property was a permissible real action under Article 31 and stated that on remand "it is for the trial court to determine whether to grant the plaintiff title to the disputed real property." (p. 14a, *infra*).

The Court referred to two principal grounds for its conclusion. First, the Court reasoned that the language of the exception "raises the sole question of whether the real property is *itself* the disputed object of the litigation." (p. 12a, *infra*). Observing that "[t]he substance of [Mrs. Fernandez'] claim is that she is entitled to the home as an immediate and essential consequence of her marital dissolution," the Court considered this to be an action where the real property was the object of the litigation. (*Id.*).

Secondly, the Court stated that the "overriding emphasis of the Convention is functional" and that the justification for the immunity provided for therein was the need to safeguard the actual functioning of the diplomatic mission. Quoting from one

commentator on the Vienna Convention, the Court wrote that the drafters of that Convention had attempted to balance the need to protect the diplomat and the conflicting need to minimize abuse in formulating the scope of diplomatic immunity under the Vienna Convention as well as the exceptions from that immunity. The Court provided no further articulation or analysis as to what significance, if any, the perceived functional underpinning of immunity had with respect to this case. (p. 13a-14a, *infra*).

Finally, the Connecticut Supreme Court held that, on remand, the trial court would not have authority to award Mrs. Fernandez any support payments or other ancillary monetary relief. Mrs. Fernandez had argued that jurisdiction to consider such monetary claims sprang not from any provision in the Vienna Convention but from "her alleged due process right of access to a judicial forum for a resolution of all disputes arising out of a marital dissolution," citing *Boddie v. Connecticut*, 401 U.S. 371, 377-79 (1971). (p. 15a, *infra*). The Connecticut Supreme Court, however, refused to extend *Boddie* to require, not only a right of access to dissolve a marriage but also, a constitutional right of access to obtain proprietary relief incident to the divorce where such relief was otherwise barred by diplomatic immunity. (*Id.*).

Two Justices dissented in part from the majority opinion. They stated that the trial court lacked jurisdiction over "all of the plaintiff's claims that expressly invoke the authority of the court under our marital dissolution statutes to grant relief beyond the dissolution of the marriage itself, a remedy to which the defendant's [the Ambassador's] waiver expressly assents." (p. 20a-21a, *infra*). In their view, jurisdiction under the "real action" exception of Article 31 was limited to adjudicating the *present* interests of the parties in the Connecticut property; jurisdiction did not extend to Mrs. Fernandez's claim under state law that she was entitled to an assignment of all or any part of the Ambassador's property as an incident of the marital dissolution. (p. 18a, *infra*).

On September 20, 1988, the Connecticut Supreme Court denied the Ambassador's timely filed Motion for Reargument and Clarification. (p. 1a, *infra*).

STATEMENT AS TO FINALITY

The fact that the Connecticut Supreme Court remanded this case to the trial court for further proceedings does not affect or destroy the finality of the Connecticut Supreme Court's judgment for purposes of 28 U.S.C. § 1257(a). That Court has made a final determination, binding on the remand proceedings, that by virtue of paragraph 1(a) of Article 31, the Ambassador is not immune from the jurisdiction of the state court to resolve what it held to be a "real action."

The thrust of the defense of diplomatic immunity, like a defense of sovereign immunity, is that the diplomat is immune from any assertion of jurisdiction over his person or property, whether on remand or otherwise. *See Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987) (upholding the immediate appealability of the denial of a claim of sovereign immunity, stating: "[a] foreign government should not be put to the expense of defending what may be a protracted lawsuit without an opportunity to obtain an authoritative determination of its amenability to suit at the earliest possible opportunity."). Like an absolute prosecutorial immunity, diplomatic immunity is an entitlement not to stand trial or submit to jurisdiction at any stage of a proceeding. *See Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). As this Court wrote in *Mitchell*:

> The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, *it is effectively lost if a case is erroneously permitted to go to trial.* Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, the district court's decision is effectively unreviewable on appeal from a final judgment.

Id. at 526-27 (emphasis added).[2]

In the instant case, the Connecticut Supreme Court's denial of the Ambassador's claim of immunity, as in *Mitchell v. Forsyth*, "finally and conclusively determines the defendant's claim of right not to stand trial on the plaintiff's allegation." Absent immediate review of the Ambassador's claim of immunity, that immunity will, *de facto*, be lost forever.

REASONS FOR GRANTING THE WRIT

I.

This Case Is One Of Only Two Types Of Controversies Deemed Sufficiently Significant By The Framers Of The United States Constitution To Merit This Court's Original Jurisdiction

This is a case "affecting Ambassadors, other public Ministers and Consuls." As such, the case intrinsically partakes of the special significance that led the Framers to place this kind of case within the original jurisdiction of this Court.

Congress has seen fit, of course, to make this aspect of original jurisdiction non-exclusive in nature, thus recognizing that state courts have concurrent jurisdiction over cases affecting ambassadors. 28 U.S.C. § 1251(b)(1). Such concurrent jurisdiction, however, does not diminish the special, international flavor of this case as it comes to this Court by way of certiorari to the Connecticut Supreme Court.

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2 *See also Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963) (holding a decision relating to proper venue to be immediately appealable as a prevention "to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings."); *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977) (holding a decision relating to *quasi in rem* jurisdiction to be immediately appealable, this court noted, "if the judgment below were considered not to be an appealable final judgment, 28 U.S.C. § 1257(2), appellants would have the choice of suffering a default judgment or entering a general appearance and defending on the merits."); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975).

Indeed, whether an ambassadorial case arises out of this Court's original or appellate jurisdiction, the Framers presumably intended that such a case be finally resolved by this Court. The dignity of foreign states and their ambassadors demands that resolution of their privileges and obligations under international treaties and conventions not be left to the judicial vicissitudes of our fifty State Supreme Courts. Foreign dignitaries and their sovereigns are not likely to give a Connecticut Supreme Court interpretation of Article 31 and 32 of the Vienna Convention very much respect. Only this Court can speak with authority on such matters, which is precisely why the Framers put such cases within the original jurisdiction of this Court.

II.

The Decision Below Presents An Important Case Of First Impression With Respect To The Scope Of Diplomatic Immunity Under Article 31 Of The Vienna Convention

Article 31 of the Vienna Convention shields diplomatic agents with total immunity from criminal, civil and administrative jurisdiction in the receiving state with three narrow exceptions, only one of which is here germane. This case involves an interpretation of that one exception—the exception pertaining to "a real action relating to private immovable property situated in the territory of the receiving state . . . ."[3] With respect to that interpretation, this case, as the Connecticut Supreme Court realized, presents an important question of first

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3 It should be noted, however, that, based on the record before the Connecticut Supreme Court, this case never involved a real property claim that was cognizable under paragraph 1(a) of Article 31 in the first place. Mrs. Fernandez never claimed she held title to the real estate at issue. (p. 4a, *infra*). Rather, title to the real estate was in a corporation that the Ambassador controlled and with respect to which Mrs. Fernandez claimed a stock ownership. In an affidavit before the trial court she attested: "This home is owned by Santa Barbara Estates U.S.A., Inc. This entity is controlled by my husband." (*Id.*).

A claim based on an alleged interest in the stock of a corporation that holds real estate as an asset is simply not a "real action."

impression.[4] (p. 11a, *infra*). There are no published cases construing this exception. Moreover, as at least one commentator on the Vienna Convention remarked: "The wording of Article 31(1)(a) contains several ambiguities, not all of which can be satisfactorily resolved by examination of the travaux preparatoires." E. Denza, *Diplomatic Law—Commentary on the Vienna Convention on Diplomatic Relations*, 155 (1976). Continuing, the commentator observed: "There was no discussion of the meaning of 'real action' at any stage of the preparation of the Vienna Convention." *Id.* at 161.

In spite of the lack of articulation by the drafters of the Vienna Convention as to the meaning of this exception, it is clear that the exception was never intended to open a back door to permit *in personam* divorce actions against diplomatic agents who are immune from such actions in the first place.[5] Rather, the exception was intended to cover actions *in rem* relating to

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4 The importance of the case is attested to by the Connecticut Supreme Court's expedited review of the trial court's decision under section 52-265a of the General Statutes of Connecticut, as well as by the *amicus curiae* involvement of the United States Department of State before the Connecticut Supreme Court.

5 That diplomatic agents are immune from divorce actions under the Vienna Convention could not be more clear. Such was the result in *Shaw v. Shaw*, 3 W.L.R. 24, 3 All E.R. 1 (Fam. Div. 1979), the only reported decision counsel for either party were able to find adjudicating a claim of immunity under the Vienna Convention in the context of a divorce case. Moreover, the drafters of the Vienna Convention left no doubt that this was their understanding as to the scope of the diplomatic immunity set forth in the Vienna Convention. *See, Report of the International Law Commission to the General Assembly*, [1956] II Y.B. Int'l L. Comm'n 139, U.N. Doc. A/CN.4/SER.A/1956/Add.1 (observation during discussion on immunity from civil jurisdiction that "the *prestige of States* demands exceptional protection, particularly in those cases in which the Courts would have to discuss *delicate private affairs* (family matters; publicity of the procedure; publication in newspapers, etc.)" (Emphasis in original)); and *Summary Records of the 402nd Meeting*, [1957] 1 Y.B. Int'l L. Comm'n 97, U.N. Doc. A/CN.4/SER.A/1957 (observing during discussion on scope of immunity intended under treaty language providing immunity from "civil

real property. *Id.* at 159-60. Indeed, the very term "real action" means an action brought for the specific recovery of lands based on direct right to the land. In this regard, one commentator has written:

> All actions, says [Bracton], are either *in rem*, *in personam*, or mixed. *Fleta and subsequent writers converted their phrases in rem and in personam into the terms real and personal.*
>
> . . .
>
> . . . Primarily the action *in rem* lies to enforce such rights as are available not against a particular individual, but against the whole world. *But it has another meaning—that of an action directed against the thing itself.* The action *in rem* is therefore either an *impersonal* action or an action against a thing.

3 Street, *Foundations of Legal Liability*, 37-38 (1906) (Footnotes omitted, emphasis added).

A recurring definition of the term "real action" provides that:

> Real actions were based upon the plaintiff's, or demandant's as he was called, *right of property* in the specific thing which was the subject of controversy, his *dominium*; they were brought to establish this ownership, and

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jurisdiction" that—"[t]he immunity of the diplomatic agent was maintained even in the apparently unrelated matter of divorce, because a divorce action under the local jurisdiction was incompatible with his dignity as a diplomat."). *See also Tsiang v. Tsiang*, 194 Misc. 259, 86 N.Y.S.2d 556 (N.Y. Spec. Term 1949); *Anonymous v. Anonymous*, 44 Misc.2d 14, 252 N.Y.S.2d 913 (N.Y. Fam. Ct. 1964); *Carrera v. Carrera*, 84 App. D.C. 333, 174 F.2d 496 (D.C. Cir. 1949) (all of which involved dismissals of family matters prior to the adoption of the Vienna Convention but for the same fundamental reasons that prompted the drafters of the Vienna Convention to include family matters within the scope of civil jurisdiction from which diplomatic agents are immune).

> sometimes his right of possession against an adverse claimant who had taken possession and asserted ownership. In this respect they were identical with and plainly copied from the group of actions in the Roman law termed "vindications" (*vindicationes*), but differed from the latter in being confined to lands.

Pomeroy, *Remedies and Remedial Rights by the Civil Action*, 14 (1876) (emphasis added). Accordingly, "a real action is only available to one out of possession *who can prove an estate in the realty that entitles him to recover possession.*" *Lewien v. Cohen*, 432 A.2d 800, 802 (Me. 1981) (emphasis added).[6] It is the right to property based on title rights, not some indirect, *in personam* divorce claim based on the quality of the marriage, the health of the parties, etc., that is the basis of a "real action."

Mindful of this distinction, the drafters of the Vienna Convention concluded that the exception to the broad rule of diplomatic immunity set forth in Article 31 1(a) for "real actions" was not contrary to the Vienna Convention's underlying purpose for extending diplomatic immunity in the first place, *i.e.*, "to insure the efficient performance of the functions of diplomatic missions." Vienna Convention, Preamble. For such proceedings, involving vindications of title only, would necessarily operate in an *in rem* fashion not involving the diplomatic agent personally. Indeed, such was the reasoning of the United States Department of State in its instructions to the United States delegation to the 1961 United Nations Conference in Vienna in which it wrote: "[S]ince actions respecting real property are usually *in rem*, it cannot be argued that an action affecting real property held by a diplomatic agent for non-diplomatic purposes will interfere with the proper performance of his diplomatic functions." Position Paper Prepared for the United

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6 *See* Dean, *Summary of the Law and Practice of Real Actions*, 85 (1868); *Farrands v. Melanson*, 438 A.2d 910, 913 (Me. 1981) (real action at common law based on *title* right); *Board of Commissioners v. Hunter*, 354 So.2d 156 (La. 1977) (real action based on *title* to the demanded premises).

States Delegation to the United Nations Conference on Diplomatic Privileges and Immunities, *cited in* 7 M. Whiteman, *Digest of International Law*, 407 (1970).

In spite of the well considered, *in rem* basis for the "real action" exception to diplomatic immunity, and in spite of the manifest intent of the drafters of the Vienna Convention to protect diplomatic agents from deeply personal divorce suits, the Connecticut Supreme Court, nonetheless, seized upon the "real action" exception as a basis for, in effect, asserting *quasi in rem* jurisdiction over the Ambassador. For under that Court's decision, the Superior Court will have jurisdiction to award the Ambassador's real property based not on title rights, but rather based on *in personam*, statutory state divorce criteria. Indeed, permitting an award of a diplomatic agent's real property in the context of a Connecticut divorce action would result in an award of real property that, under section 46b-81 of the Connecticut General Statutes, would have to be based on "*the length of the marriage, the causes for the . . . dissolution of the marriage . . . , the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income*"—factors that are not even remotely related to the real property at issue or in whom its title is properly vested, but factors that do require the deepest intrusion into the Ambassador's most personal affairs—factors that would directly challenge the prestige and dignity of the diplomat.

In essence, the result achieved by the Connecticut Supreme Court is a *de facto* abolishment of a diplomat's immunity from divorce suits—proceedings that even the Connecticut Supreme Court recognized were "prohibited by the Convention"—under the rationale that, because real property is the ultimate object of the litigation such suits are permissible after all under Article 31. Such a result is worse than the tail wagging the dog; such a result is nonsense. Obviously, the types of cases in which a diplomatic agent's real property may be the ultimate object of the litigation or so claimed in satisfaction of a truly *in personam*

action, by attachment or otherwise, is limited only by the creativity and persuasiveness of counsel here and abroad.

Nor does the Court's conclusionless discourse on a perceived functional underpinning for the "real action" exception lend any rationality to the result. For, the drafters' intention that diplomatic agents be immune from divorce actions was based on the fundamental precept that local jurisdiction over divorce actions that inevitably involve delicate private affairs was incompatible with the diplomatic agent's dignity. There is absolutely no indication from the drafters that they believed that this fundamental precept should be compromised and delicate private affairs pried into simply because real property could be involved by way of matrimonial award. Indeed, the drafters must have been aware in extending immunity to divorce actions in the first place that divorce actions frequently involve real property claims.

Critical of the majority's perversion of Article 31 1(a), the dissent wrote:

> *I believe the power of the court under the "real action" exception to determine the interests of the parties in the residence cannot be deemed to include the authority* given under General Statutes § 46b-81 to a court when dissolving a marriage to "*assign to either the husband or the wife all or any part of the estate of the other,*" which the plaintiff has expressly invoked in her prayer for relief, as the quotation from the majority opinion implies. . . . *If the court were to exercise the authority to assign the defendant's interest in the residence to the plaintiff pursuant to § 46b-81, as she seeks, the concern of the Convention that the immunity of a diplomat be preserved in a divorce action because such a proceeding "under the local jurisdiction was incompatible with his dignity as a diplomat" would be wholly frustrated.* 1 Y.B. Int'l L. Comm'n 97 (1957).

(p. 18a-19a, *infra*, emphasis added).

Absent sound judicial guidance from this Court to the effect that the exception is intended only for the purpose of litigating

title to property based on title rights, this exception will become the guise under which divorce actions, as well as a multitude of other truly *in personam* claims, are brought against diplomatic agents.

III.

The Decision Below Presents An Important Question With Respect To The Effect Of A Waiver Of Immunity Under Article 32 Of The Vienna Convention

The immunity from civil jurisdiction set forth in Article 31 of the Vienna Convention clearly includes immunity with respect to divorce actions.[7] Accordingly, under the mandate of section 5 of the Diplomatic Relations Act, 22 U.S.C. § 254d, this action should have been dismissed outright. For, as provided in that statute: "Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations . . . *shall be dismissed.*" (Emphasis added).

In the interest, however, of providing Mrs. Fernandez with a local forum in which she could dissolve her marital status, the People's Republic of Mozambique executed a Limited Waiver of Immunity. The conditional nature of that waiver, its limitations, restrictions and purpose were clearly set forth in the body of that waiver. The waiver was made "*to the following limited and restricted extent only*, viz: to permit the Superior Court . . . *to enter an order dissolving the marital status only* between Ambassador Antonio Deinde Fernandez and his wife, Barbara J. Fernandez . . . ." (Emphasis added). The Limited Waiver expressly reserved all incidents of immunity over the person and property of the Ambassador, stating:

> This limited and restricted waiver of diplomatic immunity does not encompass . . . any waiver whatsoever of Ambassador Antonio Deinde Fernandez' diplomatic immunity . . . from *in personam*, *in rem* or any other type

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7 See n.5, *supra*.

> of jurisdiction whatsoever with respect to his person or property . . . .

(p. 6a, n.7, *infra*). Under the terms of the Limited Waiver and based on Connecticut's "no fault" divorce statute, a dissolution of the marital *res* could be achieved without the delving into fault and numerous other personal areas which a Connecticut divorce court is mandated to consider in making an award of alimony or property under Connecticut's broad, equitable distribution marital dissolution statutes.

Such was the status of this matter before the Connecticut Supreme Court. Absent the Limited Waiver, the Connecticut courts would have no jurisdiction to enter a divorce in this matter and under the terms of the Limited Waiver, the Connecticut courts could go no further than to enter an order of dissolution of the marital status only. The waiver expressly proscribed its use as a mechanism for the entry of any other orders.

In spite of the unambiguous language of the Limited Waiver of Immunity, the Connecticut Supreme Court, once it had jurisdiction under the Limited Waiver, undertook an analysis that incredibly concluded by authorizing the very result proscribed by the Limited Waiver. In this regard the Court wrote:

> After the filing of this appeal, the People's Republic of Mozambique executed a limited waiver, as is its prerogative under Article 32 of the Convention, permitting the Superior Court "to enter an order dissolving the marital status only" between the plaintiff and the defendant . . . . *The only question before us is whether, on remand, the trial court will have authority to award the real and personal property the plaintiff claims in her complaint.*

(p. 5a-7a, *infra*, footnotes omitted, emphasis added). Turning next to plaintiff's complaint and the requested assignment therein "of all of *defendant*'s right, title and interest in certain real property located at 27 Oaley [sic] Lane, Greenwich, Connecticut," (emphasis added) and then combining that request for relief with an unfounded and unprecedented construction of one of the exceptions to diplomatic immunity set forth in

Article 31 of the Vienna Convention, as discussed *supra*, at 13-19, the Court ruled that "it is for the trial court to determine whether to grant the plaintiff title to the disputed [Ambassador Fernandez'] real property." (p. 14a, *infra*).

In other words, what the Connecticut Supreme Court has done, in a manner that will undoubtedly have international repercussions, is to take a Limited Waiver of Immunity extended under Article 32 of the Vienna Convention by a sovereign nation, use it for the creation of *in rem* divorce jurisdiction and then totally disregard the plain language set forth in that Limited Waiver to improperly enhance its jurisdiction to *quasi in rem* jurisdiction. Saliently critical of this misuse of the Limited Waiver, the dissent below wrote: "Because the waiver is effective only for the purpose of dissolving the marriage, however, it cannot serve as a vehicle upon which to predicate any of the relief normally attendant upon a dissolution of marriage under our statutes." (p. 17a, *infra*).

This case, then, involves questions of first impression with respect to what import must be accorded a sovereign nation's waiver made under Article 32. If the result reached by the Connecticut Supreme Court is left uncorrected, nations will justifiably regard the waiver provision of Article 32 of the Vienna Convention as a house of mirrors promoting unpredictable distortions of any waivers extended. Such a result is in diametric opposition to the very purpose of the Vienna Convention "to insure the efficient performance of the function of diplomatic missions as representing states." This case presents an opportunity to restore predictability to the waiver provisions of the Vienna Convention so that nations may be assured that waivers granted by them will be honored according to their terms.

CONCLUSION

For all of the above reasons, Ambassador Fernandez respectfully prays that a writ of certiorari issue in this case.

Respectfully submitted,

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OF COUNSEL:

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December, 1988

APPENDIX

SUPREME COURT
STATE OF CONNECTICUT

September 20, 1988

No. 13283

BARBARA FERNANDEZ

—vs.—

OLADEINDE FERNANDEZ

ORDER

The motion of the defendant, filed July 29, 1988, for Reargument and Clarification, having been presented to the Court, it is hereby

ORDERED denied.

BY THE COURT,

CAROLYN CURBA ZROGOS
Assistant Clerk-Appellate

NOTICE SENT: Sept. 20, 1988.
DUEL & HOLLAND
CUMMINGS & LOCKWOOD
MICHAEL JAY SINGER, pro hac vice
MARK B. STERN, pro hac vice
FRANK H. SANTORO, A.U.S.A.
HON. STANLEY NOVACK
CLERK, SUPERIOR COURT, S/N
FA-87-0085485 S
REPORTER OF JUDICIAL DECISIONS

gf

Decision of the Connecticut Supreme Court

SUPREME COURT
STATE OF CONNECTICUT

July 18, 1988

No. 13283

BARBARA FERNANDEZ

—vs.—

ANTONIO DEINDE FERNANDEZ

[331] PETERS, C.J. This appeal involves the applicability of the doctrine of diplomatic immunity to an action for marital dissolution and equitable property distribution. The plaintiff, Barbara Fernandez, brought this dissolution action against her husband, the defendant Antonio Deinde Fernandez. Claiming diplomatic immunity by virtue of his status as an ambassador to the United Nations for the People's Republic of Mozambique, the defendant moved to dismiss the entire action for lack of personal jurisdiction.[1] The trial court denied the motion. We granted review pursuant to General Statutes § 52-265a[2] and we now uphold the judgment of the trial court and remand for further proceedings.

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1 The sole basis for the alleged lack of personal jurisdiction in this case is diplomatic immunity. The defendant raises no claim that he lacks minimum contacts with the forum state; *International Shoe Co. v. Washington*, 326 U.S. 310, 319-20, 66 S. Ct. 154, 90 L. Ed. 95 (1945); or that the plaintiff failed to comply with applicable statutory service of process rules. General Statutes §§ 46b-44, 46b-45 and 46b-46.

2 "[General Statutes] Sec. 52-265a. DIRECT APPEAL ON QUESTIONS INVOLVING THE PUBLIC INTEREST. (a) Notwithstanding the provisions of sections 52-264 and 52-265, any party to an action who is aggrieved by an order or decision of the superior court in an action which involves a matter of substantial public interest and in which delay may work

The complaint in this case invokes the equitable powers of the Superior Court for a variety of purposes. [332] Principally, the plaintiff seeks a dissolution of her marriage to the defendant on the ground of irretrievable breakdown. Incident to the dissolution, the plaintiff requests an assignment "of all of defendant's right, title and interest in certain real property located at 27 Oaley Lane, Greenwich, Connecticut." In addition, the plaintiff seeks a portion of the defendant's estate, support payments and attorneys' fees.

As this expedited appeal comes to us from the denial of a motion to dismiss, very little is known at this juncture about the parties to this suit. The complaint states that the plaintiff and defendant were married at Arlington, Virginia, on May 1, 1961. The parties allegedly separated in late 1984 or early 1985 when the defendant voluntarily left the marital home. A short time thereafter, but before the filing of the instant action, the defendant became Ambassador and Deputy Permanent Representative to the United Nations for the People's Republic of Mozambique.

At the hearing on the motion to dismiss, the plaintiff testified to the following alleged facts: The parties' three children were born in the United States and are above the age of majority. In 1974, the plaintiff and the defendant purchased real property at 27 Oakley Lane in Greenwich in the name of a Connecticut cor-

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a substantial injustice, may appeal under this section from the order or decision to the supreme court within two weeks from the date of the issuance of the order or decision. The appeal shall state the question of law on which it is based.

"(b) The chief justice shall, within one week of receipt of the appeal, rule whether the issue involves a substantial public interest and whether delay may work a substantial injustice.

"(c) Upon certification by the chief justice that a substantial public interest is involved and that delay may work a substantial injustice, the trial judge shall immediately transmit a certificate of his decision, together with a proper finding of fact, to the chief justice, who shall thereupon call a special session of the supreme court for the purpose of an immediate hearing upon the appeal.

"(d) The chief justice may make orders to expedite such appeals, including orders specifying the manner in which the record on appeal may be prepared."

poration, Santa Barbara Estates U.S.A., Inc. According to the plaintiff, she was the corporation's president and principal shareholder at the time of this purchase. Although the defendant traveled extensively from 1974 onward, he and the plaintiff occupied the Greenwich residence as husband and wife until his departure in late 1984 or early 1985.[3]

[333] In tandem with the filing of her complaint, the plaintiff applied for an ex parte prejudgment remedy against the defendant. In a sworn affidavit accompanying her application, the plaintiff stated that the defendant is "an international businessman and diplomat" who "has admitted to being one of the richest men in Africa. He heads dozens of companies, and I believe his net worth exceeds $75 million." She further stated that, in her opinion, the defendant could easily sell or transfer assets that are relevant to her claims for relief. Of particular concern to the plaintiff was the Greenwich home where she resides with her youngest son. "This home is owned by Santa Barbara Estates U.S.A., Inc. This entity is controlled by my husband. I am afraid that my husband will use his influence to defeat my interest in the home." The trial court, *Novack, J.*, granted the application, ordering, inter alia, that the plaintiff may attach, to the value of $8,000,000, the defendant's shares in Santa Barabara Estates U.S.A., Inc.

The trial court subsequently denied the defendant's motion to dismiss the action. Although the court found that the defendant is a bona fide diplomat entitled to whatever protection international law affords, it rejected the defendant's claim of diplomatic immunity for two reasons. The court first held that the Superior Court has plenary jurisdiction over the defendant and his assets because the instant action is a "family relations"

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3 Neither the citizenship nor the current residence of the defendant is clear on the record. The plaintiff "believes" that her husband is a Nigerian citizen. As to residence, a quitclaim deed transferring the Greenwich home from corporate ownership to the defendant individually lists his abode as of October 23, 1986, as Chateau de Bois Pouillette, 284 Chemin de Crepy, Pont Pois 60700, Pont Ste. Maxence, France. Alternatively, the plaintiff's application for order of notice cites the following potential residences: (1) 11310 Lilting Lane, Singing Woods, Fairfax Station, Fairfax, Virginia; (2) Concorde de Crillon Hotel, 10 Place De La Concorde, Paris, France; or (3) 8 Rue Nueve DuMoland, Geneva, Switzerland.

matter and not a "civil" action. Only the filing of a "civil"[4] action against diplomats is barred by the [334] Vienna Convention on Diplomatic Relations.[5] Alternatively, the court held that it at least had the authority to dissolve the marriage because of its in rem jurisdiction over the marital status of the parties. Even if the instant action is "civil" and the Convention applies, the court held that Connecticut law gave it the power to enter a valid dissolution order without having personal jurisdiction over the defendant. *Litvaitis* v. *Litvaitis*, 162 Conn. 540, 545, 295 A.2d 519 (1972). This latter holding dealt only with marital status; the court did not address the question of its authority to grant the plaintiff's claims for property distribution incident to dissolution.

After the filing of this appeal, the People's Republic of Mozambique executed a limited waiver, as is its prerogative

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4 Article 31 of the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, T.I.A.S. No 7502, 500 U.N.T.S. 95 (done at Vienna April 18, 1961, entered into force for the United States December 13, 1972), provides: "1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of: (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State . . . ."

5 The defendant enjoys diplomatic immunity in accordance with the agreement between the United States and the United Nations, Agreement Regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 3416, T.I.A.S. 1676, 11 U.N.T.S. 11. Section 15 of the Headquarters Agreement provides in relevant part that "[e]very person designated by a Member . . . as a resident representative with the rank of ambassador . . . shall . . . be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords diplomatic envoys accredited to it." While not affording protection of its own, the Headquarters Agreement incorporates the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. In accordance with the Diplomatic Relations Act, any action barred by the immunity provisions of the Vienna Convention "shall be dismissed." 22 U.S.C. § 254d (1982). Throughout this opinion, we refer to the Headquarters Agreement, the Vienna Convention and the Diplomatic Relations Act as simply the "Convention" or the "treaty."

under Article 32[6] of the Convention, permitting the Superior Court "to enter an order dissolving [335] the marital status only" between the plaintiff and the defendant.[7] Accordingly, a remand to the trial court for an adjudication of the marital status question will be necessary regardless of the outcome of this

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6 Article 32 of the Convention provides: "1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State. 2. Waiver must always be express. 3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim. 4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary."

We note, in addition, the representation of the amicus curiae United States that the defendant's diplomatic status is currently under review by the Department of State.

7 The full text of the waiver provides: "LIMITED WAIVER OF IMMUNITY "Pursuant to Article 32 of the Vienna Convention on Diplomatic Relations, the People's Republic of Mozambique hereby waives the immunity extended by the United States of America to Ambassador Antonio Deinde Fernandez under the provisions of the Vienna Convention on Diplomatic Relatoins to the following limited and restricted extent only, viz: to permit the Superior Court for the Judicial District of Stamford/Norwalk at Stamford, Connecticut, U.S.A. to enter an order dissolving the marital status only between Ambassador Antonio Deinde Fernandez and his wife, Barbara J. Fernandez, in a civil action presently pending in said Court, encaptioned *Fernandez* v. *Fernandez*, docket number FA-87-0085485-S. This limited and restricted waiver of diplomatic immunity does not encompass, and shall not be construed as encompassing, any waiver whatsoever of Ambassador Antonio Deinde Fernandez' diplomatic immunity under said Vienna Convention on Diplomatic Relations from *in personam, in rem* or any other type of jurisdiction whatsoever with respect to his person or property or any property in which he may have or claim to have an ownership interest including, without limiting the generality of the foregoing, his immunity from any awards of property and/or alimony that might otherwise be appropriate in any such matrimonial proceeding. The limited purpose of this waiver of diplomatic immunity is solely to permit the marital status only between the parties to be dissolved without Mrs. Fernandez having to institute an action for divorce in the People's Republic of Mozambique.

The People's Republic of Mozambique

By: _____"

appeal. The only question before us is whether, on remand, the [336] trial court will have any authority to award the real and personal property the plaintiff claims in her complaint.

The defendant urges us to answer this question in the negative for two reasons. He first maintains that the trial court erred in exempting this "family relations" action from the scope of "civil" proceedings defined by the Convention. Citing treaty history, prior judicial decisions and general principles of diplomatic immunity, he claims that the trial court's restrictive view is contrary to international law and illustrates the type of parochialism that the Convention meant to eliminate. Second, the defendant claims that the instant action does not come within the express exception to diplomatic immunity that permits the filing of a "a real action relating to private immovable property" owned by a diplomat. According to the defendant, this action is merely a divorce proceeding that could have ancillary consequences on real property; even if the in rem exception applies, the real estate at issue is exempt under a further Convention provision that immunizes the "private residence" of a diplomat. We agree with the first but not with the second of these claims.

I

We agree with the defendant that the instant action is "civil" for purposes of establishing immunity under the Convention. As a matter of municipal[8] law, "[a]n action for a divorce or a legal separation obviously is a civil action." *Smith* v. *Smith*, 150 Conn. 15, 19, 183 A.2d 848 (1962). General Statutes § 46b-45 leaves no doubt that "[a] proceeding . . . for . . . dissolution of marriage . . . shall be commenced by the service and filing of a complaint as in all other civil actions in the superior court . . . ." The plaintiff's reliance on [337] *Chieppo* v. *Robert E. McMichael, Inc.*, 169 Conn. 646, 363 A.2d 1085 (1975), is unavailing. In *Chieppo*, we held that an appeal to the

8 In the context of international law, the term "municipal" refers to a nation or state, not the narrower entity of a city or town. Black's Law Dictionary (Rev. 4th Ed. 1968) p. 1169.

Superior Court from a workers' compensation proceeding is not a "civil action" within the meaning of the transfer statute then in effect. A key basis for this conclusion was that the legislature had created a special regime for the informal and expeditious resolution of compensation claims. *Id.*, 651-54. There is no similar comprehensive administrative scheme relating to domestic relations. Contrary to the plaintiff's suggestion and the trial court's conclusion, the mere existence of separate Practice Book provisions pertaining to family matters does not rebut the strong inference, flowing from § 46b-45 as well as from *Smith* v. *Smith*, supra, that divorce proceedings are "civil" actions under Connecticut law.

Even if municipal law were equivocal on this question, controlling principles of international law dictate that the instant claim is a "civil" action. Article 31 of the Vienna Convention provides that a "diplomatic agent shall enjoy immunity from the . . . civil and administrative jurisdiction" of the receiving state. The negotiating history of the Convention supports a broad reading of this language. Sir Gerald Fitzmaurice, the special rapporteur who drafted the Convention under the auspices of the International Law Commission, explained that he "could not imagine a proceeding which would not fall under one of the three jurisdictions—criminal, civil and administrative." 1 Y.B. Int'l L. Comm'n 147 (1958). Further, the record reveals an explicit awareness by the drafters that marital dissolution proceedings were prohibited by the Convention. One drafter noted that "[t]he immunity of the diplomatic agent was maintained even in the . . . matter of divorce, because a divorce action under the local **[338]** jurisdiction was incompatible with his dignity as a diplomat." 1 Y.B. Int'l L. Comm'n. 97 (1957).

We therefore conclude that the trial court's assertion of jurisdiction under the aegis of "family relations" was erroneous. See also *Shaw* v. *Shaw*, 3 All E.R. 1, 3, 3 W.L.R. 24 (1979) (construing Article 31 to bar divorce proceedings against an accredited diplomat). Our conclusion is consistent with case law in effect in this country prior to the entry into force of the Convention in 1972. In *Carrera* v. *Carrera*, 174 F.2d 496, 498 (D.C. Cir. 1949), and *Tsiang* v. *Tsiang*, 194 Misc. 259, 260, 86 N.Y.S.2d 556 (1949), the courts dismissed actions for marital

separation on grounds of diplomatic immunity. Article 31 and its negotiating history therefore affirm the general principle that the Vienna Convention was meant to codify existing rules of customary international law. E. Denza, Diplomatic Law—Commentary on the Vienna Convention on Diplomatic Relations (1976) p. 1. Prior decisions such as *Carrera* and *Tsiang* are strong evidence of the intent of the drafters of the Convention and the consequent meaning of Article 31 itself. Accordingly, the trial court erred in finding that this was not a "civil" matter and that it had plenary power to adjudicate all facets of this case.

II

Article 31 of the Convention immunizes a diplomatic agent from the civil jurisdiction of the receiving state "except in the case of: (1) a real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending State for the purpose of the mission." The question that we must resolve is whether the plaintiff's claim to the title of the Greenwich home and real estate is cognizable under this exception to the rule of diplomatic immunity.

[339] It is true, as the defendant emphasizes, that the plaintiff's claim arises in the context of a marital dissolution action. It is also true, as we noted earlier in this opinion, that such actions are normally barred by a diplomat's immunity from the "civil" process of the receiving state. It is not necessarily true, however, that the generalized immunity conferred by the treaty prevails over the specific language of the in rem exception. To the contrary, we believe the in rem exception, as a particularized recognition of the receiving state's special interest in its land, reflects an intent to limit the generalized protection of Article 31 of the Convention. Whether such a result is mandated in the circumstances of this case depends on the precise meaning of the phrase "real action relating to private immovable property." Since the plaintiff has raised a bona fide question regarding the applicability of the in rem exception, we must

interpret the Convention as a whole to determine whether her claim is meritorious.

Before turning to the ultimate issue, however, we are mindful that, but for diplomatic immunity, the plaintiff's claim for real property incident to marital dissolution would readily be entertained by our courts. Domestic relations is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna* v. *Iowa*, 419 U.S. 393, 404, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975); *Carabetta* v. *Carabetta*, 182 Conn. 344, 346, 438 A.2d 109 (1980). This plenary state power encompasses not only the regulation of marital status, but also the distribution of property and protection of offspring. *Williams* v. *North Carolina*, 317 U.S. 287, 298-99, 63 S. Ct. 207, 87 L. Ed. 279 (1942). Federal courts decline to excercise jurisdiction over petitions for divorce or alimony, even where diversity of citizenship exists, out of respect for this zone of state authority. *Ohio ex rel. Popovici* v. *Agler*, 280 U.S. 379, 383-84, 50 S. Ct. 154, 74 L. Ed. 489 (1930); [340] *Barber* v. *Barber*, 62 U.S. (21 How.) 582, 16 L. Ed. 226 (1859). The plaintiff's claim for title to Connecticut real estate also invokes this state's "strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property . . . ." *Shaffer* v. *Heitner*, 433 U.S. 186, 208, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977).

It is nevertheless a basic tenet of treaty law that binding agreements are to be respected and enforced ("pacta sunt servanda"). M. Janis, An Introduction to International Law (1987) pp. 8-11. In particular, the state interest in furnishing a judicial forum in this case is subject to the supremacy of a binding treaty commitment of the United States government. U.S. Const., art. VI, § 2; *United States* v. *Belmont*, 301 U.S. 324, 331, 57 S. Ct. 758, 81 L. Ed. 1134 (1937); *Missouri* v. *Holland*, 252 U.S. 416, 434, 40 S. Ct. 382, 64 L. Ed. 641 (1920). In giving priority to a binding treaty, we must interpret the treaty in good faith in accordance with the ordinary meaning of its terms and in the light of its object and purpose. 1 Restatement (Third), The Foreign Relations Law of the United States (1987) § 325. "Interpretation . . . must, of course, begin with the language of the Treaty itself. The clear import of the treaty language con-

trols unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.' " *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 180, 102 S. Ct. 2374, 72 L. Ed. 2d 765 (1982).

Article 31 clearly sets forth an exception to diplomatic immunity for any "real action relating to private immovable property." The concept of excluding actions relating to real property from the scope of diplomatic immunity was firmly entrenched prior to the adoption of the Convention. See generally 2 Y.B. Int'l. L.

[341] Comm'n 78, 98 (1958); E. Denza, supra, pp. 154-56; C. Wilson, Diplomatic Privileges and Immunities (1967) p. 107; B. Sen, A Diplomat's Handbook of International Law and Practice (2d Ed. Rev. 1979) p. 111; *Anonymous* v. *Anonymous*, 44 Misc. 2d 14, 19, 252 N.Y.S. 2d 913 (1964). In a position paper prepared in 1961 for the United States delegation to the negotiating conference for the Convention, the Department of State recognized the historic validity of the real property exception: "It is axiomatic that real property other than that owned by the sending State and used for diplomatic purposes, is within the exclusive jurisdiction of the state in which it is located. Moreover, since actions respecting real propety are usually *in rem*, it cannot be argued that an action affecting real property held by a diplomatic agent for non-diplomatic purposes will interfere with the proper performance of his diplomatic functions." 7 M. Whiteman, Digest of International Law (1970) p. 407.

Turning to the specific meaning of the treaty in this case, we face a question of first impression concerning the intended scope of the language of the exception. The parties submit divergent interpretations. According to the plaintiff, her claim for ownership of the Greenwich home, even though it arises in the context of a dissolution proceeding, falls within the plain meaning of the exception. The defendant, on the other hand, argues that the plaintiff's position, if adopted, would eviscerate the treaty. He maintains that a litigant could evade the broad immunity of the treaty by attaching the real property of a diplomat in order to satisfy an unrelated *in personam* judgment.

Such a maneuver would, according to the defendant, enable a litigant to "alchemize" a run-of-the-mill tort dispute into one "relating to private immovable property" within the meaning of the treaty, thereby defeating the intent of the signatories.

[342] We are persuaded by the plaintiff that the treaty allows her claim for ownership of the family residence to be heard in this case, in which the sending state has waived any claim of immunity with regard to the dissolution of the marriage.[9] We rely on two principal grounds for our conclusion. First, the language of the exception eschews any technical focus on the *form* of action brought and instead raises the sole question of whether the real property is *itself* the disputed object of the litigation. Despite the absence of published cases construing the provision or any discussion by the drafters of the meaning of "real action," we are not entirely without interpretive guidance. A leading commentator has defined the exception thus: "The essence of the term 'real action' is that the relief sought is either a declaration of title to the property, an order for sale by authority of the court, or an order for possession. The term is used in the sense of an action in rem . . . ." E. Denza, supra, pp. 159-60. An identical conclusion was reached by a second commentator. "[A] real action is an action where ownership or possession of immovable property is claimed." E. Satow, Guide to Diplomatic Practice (5th Ed. 1979) § 15.13, p. 125.

The express terms of the treaty, as construed, thus support a conclusion that the Superior Court has jurisdiction over the defendant for the purpose of adjudicating the plaintiff's claim of ownership of the Greenwich home. The very object and purpose of the plaintiff's complaint is a vindication of her claimed right of ownership of the real estate. The substance of her claim is that she is entitled to the home as an immediate and **[343]** essential consequence of her marital dissolution.

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9 We need not decide whether Connecticut would in any case have jurisdiction to dissolve a Connecticut marriage that, in its entirety, antedated the assumption of ambassadorial status. Furthermore, we need not decide whether the trial court's in rem jurisdiction, which is ancillary to its jurisdiction over the status of the marriage, would continue if the sending state's waiver were to be withdrawn.

This is simply not a case where the plaintiff seeks to satisfy a collateral judgment in her favor by forcing the sale or transfer of unrelated real property. Under the latter circumstances, the defendant's concern for the evisceration of the treaty might be well-founded. When the complaint alleges a direct right of ownership of the thing itself, however, such a concern finds no basis in law or fact.

Second, the overriding emphasis of the Convention is functional. The preamble states the general principle that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of the diplomatic missions." The functional approach of the Convention is a departure from the two classical theories of diplomatic immunity. One theory posited that the diplomat was the personification of the sending state and therefore entitled to the highest dignity. Another theory rested on the legal fiction that the diplomat was always on the soil of the sending state, wherever he or she might actually go, and therefore was extraterritorially immune from process. See generally B. Sen, supra, pp. 80-81; C. Wilson, supra, pp. 1-16. Both theories contained an inflexible presumption of immunity for protected diplomats.

The Vienna Convention, on the other hand, adopted a theory that justifies immunity by the need to safeguard the actual functioning of the diplomatic mission. C. Wilson, supra, pp. 17-25. "The functional approach is not merely an academic rationale. During the formulation of the Vienna Convention it guided the makers at every crucial point. The general result was to tighten the protection given to the mission itself—its premises, its communications, its property, its archives and the inviolability of its senior members." E. Denza, supra, p. 5. Although we do not view the functional approach **[344]** as an open invitation to disregard the doctrine of diplomatic immunity, the Convention itself imposes limitations on the scope of immunity in order to minimize abuse.

This functional theory had a specific ramification in the drafting of the in rem exception. "[A] real attempt has been made to strike a balance between the need to protect a diplomat in regard to official matters and to guard him from the harassment of frivolous lawsuits and the conflicting need to minimise

abuse of immunity by diplomats in regard to matters which have nothing to do with their job and to provide a forum for those cases involving land where a plaintiff might otherwise have no other." E. Denza, supra, p. 4. The drafters' sense of balance is reflected by the narrow scope of the in rem exception. It does not expose to municipal jurisdiction any real property held by the diplomat "on behalf of the sending State for purposes of the mission"; Vienna Convention, Article 31(a); or the "private residence of a diplomatic agent." Id., Article 30 (1). The exception thus represents a studied effort by the drafters to balance the competing factors of national sovereignty over land and diplomatic inviolability.

On remand, then, it is for the trial court to determine whether to grant the plaintiff title to the disputed real property. The defendant argues that his interest in the family home is immune from jurisdiction as the "private residence of a diplomatic agent" pursuant to Article 30 of the Convention.[10] On the record before us, we are unable to resolve this claim. The trial court made no findings of fact on the question of whether the defendant continues to maintain his "private residence" **[345]** at the Greenwich home. It is possible that the defendant vacated the home not intending to return and therefore no longer resides there. See, e.g., *Agbor* v. *Metropolitan Police Commissioner*, 2 All E.R. 707, 1 W.L.R. 703 (1969). We, of course, express no view on the merits of this factual question.[11]

III

The final question is whether, on remand, the trial court will have authority to award the plaintiff support payments and whatever ancillary monetary relief seems appropriate. In sup-

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10 Article 30 of the Convention provides: "1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission. 2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability."

11 The dissent suggests a ground for jurisdiction that was not argued by either party in this court. In our view, we lack either a factual or legal basis for exploring it in this case.

port of jurisdiction over her claims, the plaintiff relies not on a specific treaty provision, as was the case regarding real property, but instead on her alleged due process right of access to a judicial forum for a resolution of all disputes arising out of a marital dissolution. She maintains that the residual immunity conferred upon the defendant in this case must give way to her right of access guaranteed by the fourteenth amendment to the United States constitution. See *Boddie* v. *Connecticut*, 401 U.S. 371, 377-79, 91 S. Ct. 780, 28 L. Ed. 113 (1971).[12]

This claim raises serious concerns about the interrelationship of two equally valid federal laws: constitutional principles safeguarding individual rights and treaty provisions preserving the inviolability of diplomatic agents. As a general rule, a treaty provision that contravenes "any of the prohibitions or limitations of **[346]** the Constitution applicable to the exercise of authority by the United States" is null and void. 1 Restatement (Third), The Foreign Relations Law of the United States (1987) § 302(2). The United States Supreme Court has "regularly and uniformly recognized the supremacy of the Constitution over a treaty." *Reid* v. *Covert*, 354 U.S. 1, 17, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957). The reason for this rule is that the federal government, as a creature of the constitution, must exercise its authority within the limitations proscribed by its charter. Id., 16-17.

Presumably, the right enunciated in *Boddie*, which springs from the due process clause of the fourteenth amendment, applies against the federal government through the due process clause of the fifth amendment. *Boddie* thus constitutes, in the language of the Restatement, a limitation "applicable to the exercise of authority by the United States." We nevertheless face a troubling uncertainty as to the scope of *Boddie*: Does the right of access to dissolve a marriage include the right of access to obtain proprietary relief incident to divorce? We think not.

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12 Because of the limited waiver in this case, we do not consider the further claim that *Boddie* gives the plaintiff a constitutional right of access to obtain a divorce that would take priority over the general immunity of the Convention. If the sending state were to withdraw its waiver or our interpretation of the real property exception were deemed erroneous, this difficult question would have to be addressed.

The focus of the Supreme Court in *Boddie* was squarely on the "fundamental human relationship" of marriage. *Boddie* v. *Connecticut*, supra, 383. "The denial of access to the judicial forum in *Boddie* touched directly . . . on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship." *United States* v. *Kras*, 409 U.S. 434, 444, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973). The plaintiff offers no direct authority to the contrary and we have found none. We therefore decline to expand the holding of *Boddie* beyond its factual boundaries of the marital status. Accordingly, no conflict exists between the federal constitution and the Vienna Convention in this case.

There is no error. The case is remanded to the trial court for further proceedings in accordance with this opinion.

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[347] In this opinion CALLAHAN, GLASS, COVELLO and HULL, Js., concurred.

SHEA, J., with whom HEALEY, J., joins, dissenting in part. I agree with the majority that the trial court had jurisdiction to adjudicate and protect the present interest of the plaintiff in the Greenwich residence, assuming that the property does not qualify as the "private residence of a diplomatic agent," a factual issue yet to be determined in the trial court. I disagree, however, with the implications of the majority opinion that the court upon remand would have jurisdiction to transfer to the plaintiff all or part of the defendant's interest in the residence simply because her claim of a present interest in that real estate is joined with her claim for a dissolution of her marriage. I also would find error in the failure of the trial court to dismiss all of the plaintiff's claims for relief that specifically invoke the authority of the court under our marital dissolution statutes to assign property and to grant other relief as adjuncts to a marital dissolution.

I

The majority opinion appears to concede[13] that the plaintiff's action for dissolution of her marriage, at the time the trial court denied the defendant's motion to dismiss, was barred by the Vienna Convention on Diplomatic Relations, because "the record reveals an explicit [348] awareness by the drafters that marital dissolution proceedings were prohibited by the Convention." The fact that, after the appeal was filed, a limited waiver of the defendant's diplomatic immunity was executed to permit only dissolution of the marital status of the parties renders that determination of the trial court moot. Because the waiver is effective only for the purpose of dissolving the marriage, however, it cannot serve as a vehicle upon which to predicate any of the relief normally attendant upon a dissolution of marriage under our statutes.

The prayer for relief of the complaint in this action seeks, in addition to a dissolution of the marriage, the following remedies: (1) "[a]n assignment of a portion of the defendant's estate in accordance with [General Statutes] § 46b-81"; (2) "[a]n assignment to the plaintiff of all of defendant's right, title and interest in certain real property located at 27 Oakley Lane, Greenwich, Connecticut, pursuant to [General Statutes] § 46b-81"; (3) "[r]easonable support pursuant to [General Statutes] § 46b-82"; (4) "[r]easonable attorney's fees in accordance with [General Statutes] § 46b-62"; and (5) "[s]uch other, further, and different relief as the court may deem proper." This cornucopia of demands appears to have been overlooked by the majority in declaring that "[t]he very object and purpose of the

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13 In Part III of the majority opinion the claim of the plaintiff that she has a right of access to the courts under the fourteenth amendment to the United States constitution for the purpose of dissolving her marriage, relying upon *Boddie* v. *Connecticut*, 401 U.S. 371, 377-79, 91 S. Ct. 780, 28 L.Ed.2d 113 (1971), is rejected insofar as the plaintiff asserts that right as a basis for the additional relief she seeks as an adjunct to the dissolution. Because the waiver of diplomatic immunity in respect to the dissolution itself makes it unnecessary to decide whether *Boddie* has created a constitutional right to a dissolution of marriage, absent the element of discrimination against the poor that was present in that case, the majority opinion has left the constitutional question unresolved.

plaintiff's complaint is a vindication of her claimed right of ownership of the real estate."

As I understand the majority opinion, however, it concludes that the only relief a court of this state has jurisdiction to grant, in view of the assertion of the defendant's immunity even as modified by the waiver, is that which would be appropriate under the exception in the Convention for "a real action relating to private immovable property." Since the only immovable property of the defendant in this state disclosed by the record is the residence in Greenwich occupied by both parties until the defendant's departure, the jurisdiction of the trial court under the "real action" exception would necessarily be limited to adjudicating the present interests of the parties in that real estate. Accordingly, as the majority opinion holds, the plaintiff's claims with respect to any other property of the defendant or for such monetary relief as alimony under General Statutes § 46b-82 or attorney's fees under General Statutes § 46b-62, cannot be pursued in this state. Thus, even under the majority view, the prayers seeking such relief should be dismissed because the court has no jurisdiction over the defendant to grant such relief.

The majority opinion, referring to the Greenwich residence, declares that "[t]he substance of [the plaintiff's] claim is that she is entitled to the home as an immediate and essential consequence of her marital dissolution." Because the restricted waiver of the defendant's immunity permits only the dissolution of the marriage, however, I believe the power of the court under the "real action" exception to determine the interests of the parties in the residence cannot be deemed to include the authority given under General Statutes § 46b-81 to a court when dissolving a marriage to "assign to either the husband or the wife all or any part of the estate of the other," which the plaintiff has expressly invoked in her prayer for relief, as the quotation from the majority opinion implies. The authority to transfer property of one spouse to another under § 46b-81 is plainly limited to actions for dissolution or annulment of marriage or for legal separation. The court, "[i]n fixing the nature and value of the property, if any, to be assigned," is directed to consider "the length of the marriage, the causes for the . . .

dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income." If the court were **[350]** to exercise the authority to assign the defendant's interest in the residence to the plaintiff pursuant to § 46b-81, as she seeks, the concern of the Convention that the immunity of a diplomat be preserved in a divorce action because such a proceeding "under the local jurisdiction was incompatible with his dignity as a diplomat" would be wholly frustrated. 1 Y.B. Int'l L. Comm'n 97 (1957).

As her claim is summarized in the majority opinion, the plaintiff maintains "that she is entitled to the home as an immediate and essential consequence of her marital dissolution." She would, however, be barred by the Convention and the limited terms of the defendant's waiver from enhancing whatever interest in the residence she may presently possess by relying upon the circumstance that the adjudication of the interests of the parties may be made in the context of a marital dissolution proceeding. In my view, therefore, the plaintiff's claim for the relief of "an assignment of all of the defendant's interest in [the residence] pursuant to Conn. Gen. Stat. § 46b-8]" should be dismissed as beyond the jurisdiction of the court when diplomatic immunity has been raised, together with her other claims for relief that are unrelated to the residence, which the majority opinion concedes are not viable in this state.

II

The complaint in this action contained, in addition to standard allegations relating to the dissolution of the marriage, the following paragraph: "The parties are the equitable and beneficial owners of real property located at 27 Oakley Lane in Greenwich, Connecticut." The prayer for relief, which contains separate claims for specific statutory remedies as adjuncts to the dissolution, also includes a claim for general equitable relief.

An affidavit of the plaintiff filed in support of her application for a prejudgment remedy asserts that the **[351]** Greenwich residence is owned by a Connecticut Corporation, Santa Barbara Estates U.S.A., Inc. At the hearings on the defendant's motion to dismiss, the plaintiff testified that in 1974, when the home was purchased, she was the majority shareholder of the corporation. She also testified that in 1986, without her knowledge and consent, the defendant had managed to have title to the residence transferred to his name. This testimony lends some substance to the allegation of the complaint that the plaintiff has an equitable interest in this real estate for which the complaint may be construed to seek an adjudication under the general equitable powers of the court, quite apart from the remaining allegations and prayers for relief that relate wholly to the dissolution action. The complaint, therefore, may be viewed to include a claim for a "declaration of title to the property" with attendant equitable relief that undoubtedly would qualify under the Convention as "a real action relating to private immovable property." E. Denza, Diplomatic Law—Commentary on the Vienna Convention on Diplomatic Relations (1976) pp. 159-60. Although the assertion of this claim as an independent ground upon which to proceed against the defendant would have been more readily apparent had it not been intermingled with the claims that are related solely to the dissolution, the jurisdiction of the court does not depend on the niceties of pleading. "It is the fact of jurisdiction, not the way in which it is made to appear, which is the vital thing." *Artman* v. *Artman*, 111 Conn. 124, 126, 149 A. 246 (1930). The record adequately discloses that the plaintiff does claim to have an interest in real estate adverse to that of the defendant which she seeks to have determined and to protect.[14] That claim plainly falls within the "real action" exception of the Convention.

[352] I conclude therefore, that the trial court erred in failing to dismiss for lack of jurisdiction all of the plaintiff's claims that expressly invoke the authority of the court under our mari-

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14 The majority opinion in footnote 11 maintains that this ground for jurisdiction was not raised on appeal. The plaintiff's brief, however, concludes [missing copy]

tal dissolution statutes to grant relief beyond the dissolution of the marriage itself, a remedy to which the defendant's waiver expressly assents. I agree with the majority that the trial court acquired jurisdiction under the complaint to determine the interest of the plaintiff in the Greenwich residence, unless that residence constitutes the "private residence of a diplomatic agent" under the Convention, a question to be resolved upon the remand. I disagree, however, with the implicit view of the majority opinion that the interest she presently possesses may somehow be enhanced as a result of the marital dissolution or that the court may assign all or part of the defendant's interest in the residence to her pursuant to § 46b-81.

Accordingly, I dissent in part.

Decision of the Superior Court of Connecticut

SUPERIOR COURT

JUDICIAL DISTRICT OF STAMFORD/NORWALK
AT STAMFORD

October 13, 1987

NO. FA-87 0085485 S

BARBARA FERNANDEZ

—VS.—

OLADEINDE FERNANDEZ

MEMORANDUM OF DECISION

RE: DEFENDANT'S MOTION TO DISMISS (#103)

The plaintiff commenced this dissolution of marriage action on or about January 7, 1987. The defendant claims to be the Ambassador and Deputy Permanent Representative to the United Nations for the People's Republic of Mozambique. As such, he asserts diplomatic immunity under the applicable international conventions and the laws of the United States. Therefore, the defendant has moved to dismiss the plaintiff's complaint based on lack of personal jurisdiction.

The parties have presented evidence and submitted excellent briefs on the issues raised by this motion. The court compliments all counsel for their efforts.

Although the issue of the defendant's status was contested, the court finds that the defendant has sustained his burden of proof. The defendant is found to be the Ambassador and Deputy Permanent Representative to the United Nations for the People's Republic of Mozambique. Enjoying this status, the defendant is entitled to diplomatic immunity from all civil and

administrative proceedings. The source of this immunity is the Vienna Convention on Diplomatic Relations of April 18, 1961 which applies to the defendant under the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, Headquarters Act, CH. 482, 61 Stat. 762, Art.V section 15 (1947). The immunity afforded the defendant is set forth at 22 U.S.C. Section 254a *et seq.*, and the Vienna Convention is adopted as setting the standards for diplomatic immunity.

Although the court finds that the defendant enjoys diplomatic immunity from civil actions, the question remains whether under the law of this state, the instant action for dissolution of marriage is a civil action. If not, then the defendant would enjoy no immunity because of his status.

The court finds merit in the plaintiff's claim that the current action is not a civil action. Pursuant to Connecticut General Statutes section 46b-1 it is a "family relations matter". It is pending on the family relations docket and has not been transferred, pursuant to section 46b-2, to the criminal or civil docket.

The Connecticut Supreme Court has recognized that not all non-criminal actions pending before the superior court are "civil actions". It has noted that probate appeals, workmen's compensation matters and actions to enforce arbitration are not "civil actions". *Chieppo v. Robert E. McMichael*, 169 Conn. 646 (1975). The reasoning behind such cases is that, despite the broad definition of civil action in Connecticut General Statutes Section 52-91, the General Assembly has set forth procedures outside of Title 52 for certain actions. *See Chieppo, supra.*

This is a family relations action brought under Title 46b. Title 46b and the applicable Practice Book sections set forth separate rules that are applicable to family matters only. Thus, it appears that the Connecticut General Statutes themselves indicate that family matters in Connecticut are not civil actions. Therefore, the court concludes that the defendant's diplomatic immunity does not extend to this dissolution action.

Even if the court were to find that the present action is a civil action and that the defendant has diplomatic immunity, the defendant's motion must still fail. The court has jurisdiction

over the marriage res and can dissolve the marriage of the parties without any appearance by the defendant. Connecticut General Statutes section 46b-42 provides that the superior court shall have exclusive jurisdiction of all complaints seeking a decree of annulment, dissolution of marriage or legal separation. Connecticut courts have interpreted this statute to mean that a dissolution of marriage proceeding is an action *in rem* and not an action *in personam* which requires the appearance of or jurisdiction over the defendant. *Litvaitis v. Litvaitis*, 162 Conn. 540, 545 (1972); *Vogel v. Silvester*, 148 Conn. 666, 670 (1961); *Murphy v. Murphy*, 34 Conn. Supp. 251, 253 (1978). The Connecticut Supreme Court has held that the state has a sufficient nexus with the marriage to justify jurisdiction if one of the parties to the marriage meets the statutory jurisdictional requirements. *LaBow v. LaBow*, 171 Conn. 433, 437 (1976).

In this action, the plaintiff is an American citizen and a long time resident of Connecticut. She is entitled to the privileges and protections afforded by Connecticut law, including the right to obtain a dissolution of her marriage, even if the court lacked personal jurisdiction over the defendant.

The defendant's motion to Dismiss is denied.

/s/ NOVACK, J.
Novack, *Judge*

Decision entered in accordance with the foregoing Oct. 13, 1987

[Illegible], Asst Clerk

All counsel notified 10-13-87